The Non-Rules of Evidence in the ad hoc Tribunals

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I. Introduction[1]

In the very first case of the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadiæ*,[2] a prosecution witness who had requested and received anonymity testified that Dusko Tadiæ had unlawfully imprisoned him and that "he had seen Mr. Tadiæ commit beatings, rapes, and murders."[3] Because of his protected status, the witness was effectively shielded from impeachment and cross-examination.[4] Mr. Tadiæ's defense counsel violated the anonymity order, discovering both the witness's identity and the fact that the story had been fabricated.[5] The witness claimed he lied because government forces had threatened to execute him unless he claimed to be an eyewitness.[6] Following this revelation, the prosecution dropped the charges the witness was trying to prove.[7]

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1. For convenience, this article will refer most often to the International Criminal Tribunal for the former Yugoslavia (ICTY), although the discussion will generally also be applicable to the International Criminal Tribunal for Rwanda (ICTR) (the other U.N. ad hoc tribunal), except when referring to specific rule provisions. Though there are variations between the rules of the two tribunals, this article will focus on general problems applicable to both.

2. ICTY Website, About the ICTY, http://www.icty.org/action/timeline/254 (last visited June 26, 2011); *see generally* Prosecutor v. Tadiæ, Case No. IT-94-1, Case File, *available at* http://www.icty.org/case/tadic/4#trans.

3. Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT'L L. 381, 399 (1998).

4. *Id.*

5. *See id.* (noting that the defense disobeyed the anonymity order and the witness had lied about numerous facts).

6. *Id.*

7. *Id.*

This was the ICTY's first case. Cases that follow offer similarly troubling examples. In *Prosecutor v. Miloševiæ*,[8] "the tribunal preliminarily accepted 245 intercepts into evidence . . . based on the testimony of a single witness known as B-1793 who testified in closed session as to their authenticity."[9] The court hired an expert to spot-check fifteen of the intercepts,[10] and after a determination by the expert that there had been no evidence of tampering,[11] the court admitted *all* of the intercepts deemed relevant into evidence.[12] In a third case, *Prosecutor v. Kupreškiæ*,[13] the Trial Chamber convicted two of the five defendants on the uncorroborated, serious-inconsistency-laden testimony of a thirteen-year-old girl who first identified the black-faced attackers weeks after the incident.[14]

In each of these cases, the laws of evidence failed the accused. This article attributes these failures to both judges' overconfidence in their ability to weigh competing pieces of evidence in the specific context of the ad hoc tribunals' procedural system and the lack of sufficient codification of evidentiary rules in these tribunals. Not wanting to be shackled by technical rules, the courts started out with only ten vague evidentiary principles.[15] While flexibility is necessary to accommodate the new and unique problems faced by international criminal trials, the lack of robust admissibility standards, a characteristic of civil law systems, does not mix well with the common law adversarial approach. Trials have been dreadfully slow, and although changes have been made along the way to speed things up, some alterations have come at the expense of the rights of the accused and the legitimacy of international criminal justice.

Part II of this article provides a general background by exploring the precedential value of Nuremberg to international criminal evidence, why international criminal evidence is different from other kinds of evidence, and the general anatomy of proceedings in the ICTY. Part III explores the differences between common law and civil law systems and how those differences play out in the ad hoc tribunals. Part IV discusses general theories of evidence while Part V discusses specific evidentiary issues in the ICTY. The conclusion this article reaches is that the rights of the accused, as well as the legitimacy and

8. *See generally* Prosecutor v. Miloseviæ, Case No. IT-02-54, Case File, *available at* http://www.icty.org/case/slobodan_milosevic/4.

9. Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477, 494 (2006).

10. *Id.*; Prosecutor v. Miloseviæ, Case No. IT-02-54-T, Second Decision on Admissibility of Intercepted Commc'ns, (Feb. 9, 2004), *available at* http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040209-2.htm.

11. *See* Prosecutor v. Miloseviæ, Case No. IT-02-54-T, Final Decision on the Admissibility of Intercepted Commc'ns., (June 14, 2004), *available at* http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040614.htm (quoting expert who found that "[g]enerally speaking, the linguistic and technical examinations revealed no evidence of tampering or editing").

12. *See id.* (admitting 220 of 245 intercepts).

13. Prosecutor v. Kupreškiæ, Case No. IT-95-16, Case File, *available at* http://www.icty.org/case/kupreskic/4.

14. *See* Patricia M. Wald, *Rules of Evidence in the Yugoslav War Tribunal*, 21 QUINNIPIAC L. REV. 761, 773-74 (2003) (describing evidentiary issues in case) [hereinafter *Rules of Evidence*].

15. *See generally* ICTY Rules of Procedure and Evidence, Rules 89-98, U.N. Doc. IT/32/Rev. 2 (Oct. 4, 1994), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev2_en.pdf. Now, the ICTY has sixteen rules of evidence. *See id.*; *see also* ICTY Rules of Procedure and Evidence, Rule 13, IT/32/Rev. 45 (Dec. 8, 2010), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf [hereinafter ICTY Rules Dec. 8, 2010]. The Federal Rules of Evidence are almost seventy in number. *See generally* FED R. EVID.

expediency of the trials in general, would be better served by a more substantial codification of rules and the use of investigative judges to gather and pre-screen evidence.

II. General Background

A. NUREMBERG: REALLY A PRECEDENT?

In international criminal law, reference is sometimes made to the "Nuremberg precedent." Those trials have certainly been of great general relevance to the modern international criminal tribunals, but their relevance is less apparent in the context of *evidence* in these contemporary courts. Granted, Nuremberg and Tokyo are not completely unhelpful in this area. One feature common to those tribunals and the current ones is the relatively flexible approach to the admission of evidence. For example, the International Military Tribunal for the Trial of German Major War Criminals (IMT) Charter Article 19 provides, "the Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value."[16] Similarly, Rule 89(C) of the ICTY Rules of Evidence and Procedure broadly states, "[a] Chamber may admit any relevant evidence which it deems to have probative value."[17]

While Nuremberg's evidentiary approach was criticized—including by Justice Pal, who complained that it left judges without any real guidance[18]—its supporters rationalized the approach with the realities that there were a large number of potential defendants and that they needed to be tried expeditiously.[19] It also freed the judges from the often-constricting rules of evidence used in common law systems. Since the historical trials were tried without juries, judges thought it made little sense to import common law rules designed to guard a jury from hearing potentially unreliable or prejudicial information.[20] Judges, they asserted, did not need to be guarded in the same fashion.[21]

While this liberal approach to admissibility has carried over into the jurisprudence of the ad hoc tribunals,[22] the similarities end there. The ICTY has relied heavily on oral

16. Charter of the International Military Tribunal art. 19, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *available at* http://avalon.law.yale.edu/imt/imtconst.asp.

17. ICTY Rules Dec. 8, 2010, *supra* note 15, at Rule 89(C). A casual reader of the U.S. Federal Rules of Evidence may note that Rule 402's declaration that "[a]ll relevant evidence is admissible" is not any narrower than the provision in the IMT or ICTY. *See* FED R. EVID. 402. Rule 402's broad statement is followed by the highly qualifying "except as otherwise provided." *Id.* However, the vast technical rules and exceptions to these rules are not present in these international tribunals: hearsay is frequently admitted, and there are few formal rules regarding admissibility. *See, e.g.*, JOHN HATCHARD, BARBARA HUBER & RICHARD VOGLER, COMPARATIVE CRIMINAL PROCEDURE 75 (1996); *see also infra* Part III.A.

18. "In prescribing the rules of evidence for this trial the Charter practically discards all the procedural rules devised by the various national systems of law . . . to guard a tribunal against erroneous persuasion, and thus left us. . .to guide ourselves[.]" United States v. Araki, Dissenting Opinion of Justice Pal, in 21 THE TOKYO MAJOR WAR CRIMES TRIAL 139 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

19. JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 95 (2002).

20. *Id.* at 96.

21. President Webb's ruling for the trial at the International Military Tribunal for the Far East stated, "[W]e are not a jury, but judges; . . . we can be trusted to hear things that might prejudice a jury but which would not influence us." THE TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 18, at 7204.

22. "The principle . . . is one of extensive admissibility of evidence—questions of credibility or authenticity being determined according to the weight given to each of the materials by the Judges at the appropriate

testimony, while the prosecution at Nuremberg built its case primarily around documentary evidence.[23] For the first Chief Prosecutor at Nuremberg, Robert Jackson, "the Teutonic penchant for meticulous record keeping would greatly ease [the] task of proving the criminal charges."[24] This treasure trove of thousands of documents,[25] however, is likely unique to the Nazis; a similar paper trail is unlikely to be present in future post-conflict situations.[26] First, modern tribunals often act without the full cooperation of a state, which may be reluctant to hand over damning documents.[27] Also, modern militant groups are less likely to give direct orders to kill or abuse, and even where written records are available—which is not always the case, as much of the relevant physical evidence will have been destroyed or lost[28]—the chain of command on paper may differ significantly from the actual one.[29] Finally, to the extent that Nuremberg's high degree of reliance on documentary evidence led to a comparatively lesser emphasis on the accused's right to a full answer and defense, post-World War II developments in international human rights law might prevent such evidentiary and procedural approaches from being pursued again.[30]

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time." Prosecutor v. Blaškiæ, Case No. IT-95-14, Judgment, Declaration of Judge Shahabuddeen, ¶ 34 (Mar. 3, 2000), *available at* http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf. This approach also resembles criminal trials in civil law systems. *See* MAY & WIERDA, *supra* note 19, at 93.

23. *See* Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 19 INT'L J. REFUGEE L. 609, 614 (2008). Indeed, Chief Prosecutor Robert Jackson's preference was to exclude live testimony completely and rely solely on documentary evidence. *See* Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 538 (2001) [hereinafter *Incredible Events by Credible Evidence*]; *see also* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 135-36, 148 (1992) (describing Colonel Storey—head of the Document Division—as "obsessed by his trove of documents . . . to a degree that distorted his conception of the trial . . . [Chief Prosecutor] Jackson was, if anything, even more opposed than Storey to any departures from the documentary approach; as he later declared, he had decided 'to put on no witnesses we could reasonably avoid.'"). In the end, only 113 witnesses, including nineteen defendants, testified in the proceedings before the Nuremberg Tribunal. *See* Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, the Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 744 (1999). In the ICTY, it is common for a single trial to have that many witnesses. *See Incredible Events by Credible Evidence*, *supra* note 23, at 535 (noting that "some trials have featured over 200 witnesses, and seven of the ten trials [that were] completed [by 2001] have had over 100 live witnesses.").

24. TAYLOR, *supra* note 23, at 57. Affidavit testimony was allowed subject to the right of cross-examination or written interrogatories, though the court never laid down a generally applicable rule to this effect. *Incredible Events by Credible Evidence*, *supra* note 23, at 539.

25. *See* MAY & WIERDA, *supra* note 19, at 95.

26. *See Incredible Events by Credible Evidence*, *supra* note 23, at 539-40, 552 ("Obviously documents, where available, remain a most desirable form of proof, but because neither the [ICTY] nor ICTY-friendly States have as ready access to incriminating documents as the Allied High Command had, they have never become the staple of ICTY cases that they were in Nuremberg."); *see also* Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. L. & POL'Y 87, 98 (2001) (noting that "the paper trail in many of these cases is sparse and episodic as contrasted to the meticulously maintained archives the Allies had at their disposal at Nuremberg") [hereinafter *The ICTY Comes of Age*].

27. Moranchek, *supra* note 9, at 478.

28. Elizabeth L. Pearl, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victor's Justice?*, 30 AM. CRIM. L. REV. 1373, 1406 (1993).

29. Moranchek, *supra* note 9, at 478.

30. *See* Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 84 (1997) (quoting Professor William J. Fenrick, former Senior Legal

B. WHY INTERNATIONAL CRIMINAL EVIDENCE IS DIFFERENT

It may not be immediately obvious why evidence before an international tribunal should be any different from evidence before a national one, or why evidence before an international *criminal* tribunal should be any different from evidence before other international bodies. After all, given that "the task of establishing the veracity is as old as the legal process itself,"[31] what could modern international criminal tribunals have to add? There are several important distinctions.

First, there are no model rules of evidence for international tribunals, despite the wishes of some.[32] And unlike the U. S. Federal Rules of Evidence, the ICTY Rules of Evidence are few in number and quite vague. Second, the extent of the atrocities committed is unlike the factual circumstances encountered in national prosecutions. Proving mass atrocity is not the same as proving many small atrocities.[33] The elements of the various crimes will often require more sophisticated forms of proof[34] and will involve standards and terminology that have not been used in prosecutions before.[35]

Third, the judges that are making these rules generally come from a wide variety of states. There are inevitable divisions between judges from common law systems and judges from civil law systems, as well as between judges from nations within each of those systems. Each judge will bring his or her own notions of what constitutes a fair trial,

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Adviser in the ICTY's Office of the Prosecutor); *see also* Kristina Rutledge, *"Spoiling Everything"–But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151, 161 n. 65 (2004) (noting that trials *in absentia* are no longer permitted; noting defense is no longer denied access to key documents or exculpatory evidence held by prosecution). Relevant to this are the Universal Declaration of Human Rights and the fair trial provision of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171. Thank you to Harlan Cohen for making this point.

31. Byrne, *supra* note 23, at 613.

32. Thomas Buergenthal, the U.S. judge on the International Court of Justice, has suggested, "the time may be ripe to begin thinking about the advisability of drafting a model set of rules of evidence and related rules of procedure for use by international tribunals that have to engage in fact-finding. That such tribunals frequently develop these rules as they go along tends to create a great deal of unnecessary confusion and probably also some unfairness, especially for those litigants who are represented by inexperienced counsel." Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, *in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 261, 274 (Richard B. Lillich ed., 1992).

33. "You are not trying to prove 10,000 murder cases; you are trying to prove crimes against humanity. There is tons of room for jurisprudentially expanded or restricted interpretations[.]" Dixon, *supra* note 30, at 87 (quoting Kirk Makin, *From Bench to Bosnia*, Can. Law., Sept. 1996, at 18, 26); *see also id.* at 89 ("The ways in which a massive attack on a civilian population can be proven to be systematic differ vastly from proving individual or isolated incidents. The task of illustrating whether these attacks occurred as part of a policy by a State or a non-State actor, if required, presents an additional dimension of difficulty.").

34. *See id.* at 89 (noting the distinction between offenses relating to conduct of hostilities and other counts: "The information that must be adduced to prove that a particular shelling was indiscriminate is certainly more intricate than the factual basis for showing that civilians were illegally imprisoned in a detention center.").

35. *See id.* ("[Certain] provisions of the Geneva Conventions and the Additional Protocols have been incorporated into [the statutes of the ICTR and ICTY], but have not previously been prosecuted before any court. Therefore, the Tribunals have no guidance as to the nature and level of evidence that would be sufficient to prove the classification of the conflicts.")

which can vary widely between judges.[36] Resolution of otherwise banal issues can consequently be difficult and awkward.[37]

Fourth, standards set by the numerous non-criminal international tribunals have little precedential value because a substantial deprivation of liberty is not in play; the International Court of Justice, European Court of Human Rights, and Inter-American Court of Human Rights only have jurisdiction over states and cannot impose criminal penalties.[38] And while the Committee Against Torture has set forth principles on the effects of torture and post-traumatic stress on the presentation of testimony, the Committee does not hear oral evidence and only has declaratory powers.[39]

C. General Anatomy of Proceedings in the ICTY[40]

ICTY proceedings will be quite familiar to those from common law systems because the criminal procedure generally tracks that of criminal cases in the United States.[41] The trials are adversarial and public, and the order of events usually takes the form of preliminary motions[42] followed by opening statements,[43] presentation of evidence,[44] closing arguments,[45] deliberations,[46] and sentencing.[47] After arrest and initial appearance, the rules provide for broad discovery,[48] including reciprocal disclosure requirements.[49] This de-

36. *See Rules of Evidence*, *supra* note 14, at 763 ("[W]hen the Rules do not, on their face, provide an answer, judges must revert to their instincts and experience which will, in turn, vary with their origins and training.").

37. "Anyone who has watched three arbitrators, each of a different nationality and none of them having the same nationality of any of the arbitrating parties or their counsel, coming from both civil and common law systems, huddled in a whispered conference over an objection interposed by counsel for a party to a question being put by his adversary to a witness, will recognize the distinct clumsiness, if not downright embarrassment, inherent in the process of trying to make evidentiary rulings in international proceedings." Charles N. Brower, *The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, *in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 147, 149 (Richard B. Lillich ed., 1992).

38. Rutledge, *supra* note 30, at 161-62.

39. *See* Byrne, *supra* note 23, at 620-21.

40. The ICTY was created through U.N. Security Council Resolution 827, which adopted the Report On Establishing the Tribunal of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808. *See* U.N. Doc S/RES/827 (1993), *reprinted in United Nations: Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia*, 32 I.L.M. 1203 (1993) [hereinafter Report Establishing ICTY]. This Report contains the ICTY Statute in its annex. *Id.* at 1192 [hereinafter ICTY Statute].

41. Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 FORDHAM INT'L L.J. 475, 504 (1995).

42. *See* ICTY Rules Dec. 8, 2010, *supra* note 15, at Rules 72-73.

43. *See id.* at Rule 84.

44. *See id.* at Rule 85. The presentation of evidence at trial also tracks the common law model. *See* Moranchek, *supra* note 9, at 494 ("[T]he ICTY's criminal procedure largely track[s] the adversarial model by incorporating a party-driven sequence of examination-in-chief, cross-examination, re-examination, rebuttal and rejoinder . . . ."). But there are some important departures from this common law model. *See infra* Part III.

45. ICTY Rules Dec. 8, 2010, *supra* note 15, at Rule 86.

46. *See id.* at Rule 87.

47. *Id.* at Rules 100-06; *see also* Falvey, *supra* note 41 at 504-05 (describing trial procedures).

48. *See, e.g.*, ICTY Rules Dec. 8, 2010, *supra* note 15, at Rule 66(A) ("[T]he Prosecutor shall make available . . . (i) copies of the supporting material which accompanied the indictment . . . as well as all prior statements

fense disclosure requirement is unusual for common law systems[50] and is the result of a February 2008 amendment,[51] but such open discovery likely reduces surprise and delay at trial,[52] and undoubtedly also affects certain strategic matters.[53]

There are some important features of the ICTY proceedings that will be less familiar to common law lawyers, however. For instance, one controversial example is the ability of the prosecutor to appeal an acquittal.[54] This ability raises concerns of double jeopardy—which the ICTY's own rules prohibit[55]—and has been widely criticized.[56] As part of the Statute itself, however, only the U.N. Security Council can amend this provision.

A second feature unfamiliar to those in the United States is the absence, at least initially, of the plea-bargaining or immunity granting that are hallmarks of U.S. criminal cases.[57] Rule 101(B) states, "the Trial Chamber shall take into account . . . any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction."[58] While this rule may have had the same practical effect on the defendant as actual plea-bargaining in terms of sentencing, other benefits of a true plea-bargaining system—such as the saving of time and resources, the finality of the disposition, and the moving along of overcrowded dockets[59]—could be lost.

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obtained by the Prosecutor from the accused; and (ii) . . . copies of the statements of all witnesses whom the Prosecutor intends to call . . . and copies of all transcripts and written statements . . . . ").

49. *See, e.g., id.* at Rule 67(A) ("[N]ot less than one week prior to commencement of the Defence case, the Defence shall: (i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control . . . . ").

50. *See* Falvey, *supra* note 41, at 501 (noting that in common law jurisdictions, "[b]ecause the prosecution is considered to be the stronger of the two parties and bears the burden of proof, it is often obliged to disclose, whereas the defense is usually not required to disclose anything in advance").

51. *See* ICTY Rules Dec. 8, 2010, *supra* note 15.

52. Falvey, *supra* note 41, at 501.

53. *Id.* at 501-02 (noting broad discovery "encourages early decisions concerning withdrawal of charges, motions, pleas and composition of court-martial").

54. *See* ICTY Statute, *supra* note 40, at art. 25 (permitting either party to appeal on grounds of "(a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice").

55. *See* ICTY Rules Dec. 8, 2010, *supra* note 15 (requiring remedial measures to be taken if "criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal").

56. *See* Falvey, *supra* note 41, at 513 ("While there certainly is a legitimate and strong interest in seeing those who have committed crimes against humanity brought to justice, there appears to be no reason to suppose that this interest is so compelling that it ought to override the considerations that underpin the widespread prohibition against double jeopardy. No civilized legal system places ascertainment of guilt and conviction above all other considerations."). *Cf.* Green v. United States, 355 U.S. 184, 187-88 (1957) ("[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous;" suggesting an appeal would "thereby subject[ ] [the accused] to embarrassment, expense and ordeal and compel[ ] him to live in a continuing state of anxiety and insecurity, as well as enhanc[e] the possibility that even though innocent he may be found guilty.").

57. *See, e.g.,* People v. Selikoff, 318 N.E.2d 784, 788 (N.Y. 1974) (noting "throughout history the punishment to be imposed on wrongdoers has been subject to negotiation. Plea negotiation, in some form, has existed in this country since at least 1804."). In the United States, ninety to ninety-five percent of state felony cases are resolved by plea bargain. Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413, 426 (2009).

58. U.N. R. P. & EVID. 101(b).

59. *See* Creta, *supra* note 3, at 407 (describing these and other benefits of plea-bargaining).

In this respect, however, the practice of the tribunals has undergone a dramatic revolution.[60] While the initial rules did envisage the possibility of a defendant pleading guilty, the rules gave no further guidance on what happened next.[61] The ICTY statute does not clearly envisage common law style plea-bargaining, and the practice was explicitly rejected initially.[62] The advent of completion dates motivated the tribunals to adopt docket-clearing strategies, however, including plea-bargaining, and subsequent amendments required that plea agreements be informed, voluntary, and supported by the facts of the case.[63] Thus, while the practice was initially considered a distasteful and unnecessary device[64]—like the practice in some civil law systems[65]—it is now common.[66] Contrary to other aspects of the tribunals' procedures, then, which have migrated towards a civil law approach, the significant expansion of plea bargaining marks a shift towards the common law paradigm.[67] Not only is the practice common, but it has moved beyond sentence reduction[68] and now includes bargaining over the location of a defendant's detention after conviction[69] as well as the withdrawal of certain charges (so-called "charge bargaining").[70] Charge bargaining has even resulted in the withdrawal of genocide charges, which Rwanda has harshly condemned.[71]

Beyond the prosecutor's ability to appeal an acquittal and the unique and evolving approach to plea bargaining, other features of the tribunals may also be unfamiliar to common law lawyers, as a result of the tribunal's combining both common law and civil law characteristics.

III. Common Law and Civil Law Features in the Tribunals[72]

The ad hoc international criminal tribunals exhibit features that are characteristic of both common law and civil law systems.[73] Part A of this section will explore differences between the two systems at a very general level. Part B will then explore how the two systems have influenced the ICTY.

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60. NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 110 (2007).

61. *Id.* at 58.

62. CHRISTINE SCHUON, INTERNATIONAL CRIMINAL PROCEDURE: A CLASH OF CULTURES 200-01 (2010).

63. *Id.* at 59.

64. *Id.*

65. NIGEL G. FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM & LAWS 342 (3d ed. 2002).

66. SCHUON, *supra* note 62, at 201.

67. *Id.* at 202.

68. Notably, however, trial chambers have sometimes sentenced defendants outside of the ranges recommended as part of the plea agreements, which has sometimes deterred others from concluding such agreements. *See* COMBS, *supra* note 60, at 112-13.

69. *Cf. Rules of Evidence*, *supra* note 26, at 97 (noting that the pretrial detention facilities for ICTY defendants is "quite upscale, certainly in comparison to some American prisons").

70. COMBS, *supra* note 60, at 111.

71. *Id.* at 112.

72. Throughout this section, this article will interchangeably refer to common law and civil law "systems," "states," "jurisdictions," etc.

73. *See infra* Part III.

A. General Differences

At the most general level, the major difference between common law[74] and civil law[75] systems is that common law systems are party-based[76] adversarial[77] systems that often rely on juries,[78] and civil law systems are inquisitorial, judge-driven systems.[79] This is a broad generalization,[80] and many commentators have criticized the absolutist, "either-or" characterization of systems as adversarial/non-adversarial and inquisitorial/non-inquisitorial.[81] After all, the shape of a country's legal system can be attributed to numerous political, cultural, and economic factors,[82] and there are rich differences even among countries sharing the same legal framework.[83] Although it is beyond the scope of this article to explore these in detail (the reader is encouraged to explore the sources cited in the footnotes), it cannot be overstated that taxonomies that merely distinguish between adversarial/inquisitorial, common law/civil law, hierarchical/coordinate, reactive/activist, etc., do not fully capture the procedural differences among states.[84] Still, discussion of certain features that generally distinguish the two systems, while acknowledging that numerous

74. Common law systems exist in states like the United States, England, and Canada. *See* Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 Sw. U. L. Rev. 1161, 1161 (1990).

75. Civil law systems exist in states like those in continental Europe. *See id.*

76. Ilias Bantekas & Susan Nash, International Criminal Law 438 (3d ed. 2007).

77. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev. 1017, 1019 (1998).

78. *See* Bantekas & Nash, *supra* note 76, at 438, 450.

79. *Id.* at 437.

80. *Cf.* Françoise Tulkens, *Criminal Procedure: Main Comparable Features of the National Systems*, *in* The Criminal Process and Human Rights: Toward a European Consciousness 5, 8 (Mireille Delmas-Marty ed., 1995) ("Theoretically, accusatory [*i.e.* common law] proceedings are public, oral and adversarial . . . Inquisitorial [i.e. civil law] proceedings, on the other hand, are secret, unilateral, and written.").

81. *See, e.g.*, William T. Pizzi, *The American "Adversary System"?*, 100 W. Va. L. Rev. 847, 847 (1998) ("The world that seems black and white to others seems to be only gradations of gray to me: some dark, some light, but all shades of gray."); Tulkens, *supra* note 80, at 8 ("[D]istinguishing [between the two systems] is almost a metaphysical question which is now sterile and obsolete . . . [T]oday those boundaries are blurred") (internal quotation marks omitted).

82. *See* Orrantia, *supra* note 74, at 1161-63 (attributing differences in legal systems to "different historical backgrounds and national ideals . . . as well as the cultural, political and economic circumstances;" "different levels of intellectual and scientific development, which in turn generate different attitudes toward the legal norms required by society to different types of needs and different types of conflicts;" and "the obvious lack[, in some states,] among the great part of the population of access to the material commodities that facilitate economic progress").

83. *See id.* at 1162 ("Even if we compare France and Mexico, which are states with similar legal systems, we find that French law represents the antithesis of . . . Mexican law in such areas as family law, property law or contact [*sic*] law.").

84. Joachim Zekoll, *Comparative Civil Procedure*, *in* The Oxford Handbook of Comparative Law 1327, 1331-32 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

substantial exceptions exist,[85] is useful in exploring the tensions they pose in the ICTY's judicial framework.[86]

One way to envision the differences between the systems during the evidence-gathering-and-presentation stage is as a dispute versus an official investigation.[87] Common law procedure functions as a dispute between two active parties who each present a case to an ostensibly passive decision maker,[88] while civil law procedure involves an official investigation conducted by ostensibly impartial public officials to determine the truth.[89] In common law countries, the prosecutor is a party to the lawsuit and is independently responsible for investigating and prosecuting crimes.[90] Importantly, the police are generally seen as aligned with the prosecution.[91] The prosecutor in civil law jurisdictions, however, is typically seen not as a party but as another public official, like the judge, whose role is to investigate the truth.[92]

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85. *See id.* at 1330 ("Recently, English law in particular has taken a major step away from the so-called 'adversarial' model. Aimed at reducing the length of judicial proceedings, a comprehensive reform of English civil procedure has severely curtailed the power of parties and strengthened the authority of courts to manage cases."); FOSTER & SULE, *supra* note 65, at 346 ("[W]hen investigations in criminal proceedings are taken up, the police are assistants to the state prosecution, receiving orders from them."); ANKE FRECKMANN & THOMAS WEGERICH, THE GERMAN LEGAL SYSTEM 191 (1999) ("The public prosecutor is assisted by the police in carrying out the investigative process."); Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 241-42 (1998) (noting that in 1995, Spain revived the trial by jury in criminal cases); Bandes, *supra* note 57, at 418 (noting that in France, investigative judges serve with laypersons on juries); Louis F. Del Duca, *An Historic Convergence of Civil and Common Law Systems–Italy's New "Adversarial" Criminal Procedure System*, 10 DICK. J. INT'L L. 73, 81 n.40 (1991-92) (noting that one inquisitorial aspect of U.S. procedure is the *ex parte* proceedings when the police or prosecutor request a judge to issue arrest, eavesdropping, or search warrants (citing A.S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974)).

86. *But see* Zekoll, *supra* note 84, at 1334 (finding it "difficult to agree" that "grouping procedural systems into categories is either possible or useful," although it does "prove the need to pay attention to historical detail and the contemporary political, economic, and cultural conditions that prevail in individual systems").

87. *See* Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 838-39 (2005).

88. One author has suggested that a judge's discretion in sentencing is one example of how the term "adversarial" does not accurately capture judicial decision-making in common law systems. *See* Pizzi, *supra* note 81, at 851 ("Like many American judges at sentencing, the neutral and detached referee at trial turns out to have very broad discretion in sentencing.").

89. Langer, *supra* note 87, at 839. *Cf.* Hazard, *supra* note 77, at 1019 ("The judge [in a common law system] is not responsible for there being an adequate development of the evidence during trial and *a fortiori* is not responsible for there being an adequate pretrial discovery of evidence. Nor is the judge responsible for getting at 'the truth.'"). If this latter point is correct, it explains why plea bargaining fits so well in the dispute model: if procedure is a dispute between two parties, prosecutorial discretion in charging means that the prosecutor should also be able to determine when the dispute is over. *See* Langer, *supra* note 87, at 841 ("In the same way, if the defendant accepts the prosecution's claim, the dispute also ends.").

90. Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings of the ICTY*, 3 J. INT'L CRIM. JUST. 1037, 1039 (2005).

91. *Cf.* Pizzi, *supra* note 81, at 849 ("[I]f this adversary alignment of the police and the prosecutor is what marks out systems that are truly adversary systems from those that are inquisitorial, I cannot understand why we would be so proud of an alignment of forces against the suspect that seems so unbalanced in terms of resources and so likely to produce police investigations that are biased, slanted, or even distorted to favor conviction.").

92. Langer, *supra* note 87, at 840.

The implications of this are striking. First, the defense does not gather its own evidence.[93] Rather, the prosecutor and judge have a duty to gather both inculpatory and exculpatory evidence.[94] Second, the police in an archetypal civil law state act as investigators for both prosecution *and* defense.[95] Consequently, everyone involved—prosecutor, defense attorney,[96] and judge—will often work out of the same file (a dossier) and will thus have the same body of information with which to prepare for trial.[97] Moreover, the lawyers can review the growing record during the course of the investigation and can recommend that the judge seek additional evidence, request experts (or different experts), question other witnesses, or further examine the witnesses already questioned.[98]

The two systems also have different forms of adjudication. Common law jurisdictions often use juries in criminal trials while civil law jurisdictions use professional judges.[99] The famous model useful in describing these relationships is one of coordination versus hierarchy.[100] In common law jurisdictions, the jury is a lay organ that coordinates with a professional organ (the judge), resulting in a kind of bifurcated court; in the civil law hierarchical model, the court is unitary.[101] This bifurcation characterization also highlights the reasons underlying the two-stage process, pretrial and trial,[102] in common law systems: because a jury is composed of laypersons whose minds are said to be more susceptible to influence by prejudicial evidence, a pretrial is deemed necessary to control the evidence that is allowed to reach them.[103] Due to juries' perceived inability to weigh evidence fairly, common law systems have elaborate exclusionary rules that regulate the admissibility of certain kinds of evidence—for instance, hearsay evidence; opinion evi-

93. *Id.* at 841; *see also id.* at 841 n.19 ("This is because the investigating prosecutor or judge is supposed to have an objectivity and impartiality that the defense lacks . . . . ").

94. Thomas Weigend, *Prosecution: Comparative Aspects*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1234 (2d ed. 2002); *accord* Gregory A. McClelland, *A Non-Adversarial Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT'L L. REV. 1, 14-15 (2002).

95. Pizzi, *supra* note 81, at 849.

96. Though the defense attorney does act as an advocate for his client, "in principle, the advocates' function is to assist the judge in fulfillment of the judicial responsibility." Hazard, *supra* note 77, at 1019-20.

97. Pizzi, *supra* note 81, at 849.

98. Charles H. Koch, Jr., *The Advantage of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 155 (2004).

99. *See* Langer, *supra* note 87, at 844. It should be noted, however, that the bench in civil law states is sometimes composed of lay judges as well. *Cf.* BANTEKAS & NASH, *supra* note 76, at 450 ("Civil law countries often have judges on the bench who determine the case without lay members.").

100. *See* Zekoll, *supra* note 84, at 1331-32 (discussing MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 1 (1986)).

101. *See* Langer, *supra* note 87, at 844.

102. *Cf.* Hazard, *supra* note 77, at 1020. *But cf.* BANTEKAS & NASH, *supra* note 76, at 437-38 ("Trial judges [in civil law systems] lead and control the trial and rely heavily on the 'Dossier' drafted by a police officer or other investigator, containing detailed information about the pre-trial stage. Hence, the core stage of criminal proceeding in a civil law system is the pre-trial stage, rather than the trial stage."). To avoid confusion on this point, it is important to distinguish between "pretrial" in the sense of judicial proceedings in which attorneys argue motions (the common law sense) and "pretrial" in the strictly temporal sense of events that take place before trial (the civil law sense). Obviously, there was always be a time pretrial (before trial) when investigations and such are going on; but the above-referenced two-stage common law process is meant strictly to refer to the a specific phase of judicial proceedings—the pretrial phase—in which attempts are made to exclude evidence from reaching the jury during the trial phase.

103. *Cf.* BANTEKAS & NASH, *supra* note 76, at 450 ("Dubious evidence should be kept away from [juries], as such may influence the minds of the jury members.").

dence; character evidence; or evidence that is irrelevant, is protected by legal privilege, or has been improperly obtained.[104] Since juries are lacking in the archetypal civil law state, a pretrial phase is not necessary; the individual evaluating the reliability of the evidence (the judge) also participates in the verdict,[105] although in some systems laypersons will sit on panels with the judges.[106] The judge calls and interrogates witnesses, subdividing cases issue-by-issue (instead of separating legal issues from factual issues) and ordering a deeper inquiry into evidence only when necessary.[107] Thus, in civil law states, "legal instruments preventing the trier of fact from following his own cognitive path are fewer in number and are much less frequently invoked than in Anglo-American systems of adjudication."[108] Admissibility rules are largely missing,[109] and evidence is rarely excluded.[110]

B. THESE CHARACTERISTICS IN THE ICTY

The ICTY's Rules of Evidence and Procedure—initially 125 of them,[111] spanning seventy-two pages—were written in a quick two months in early 1994.[112] The common law insistence on live testimony was combined with the civil law liberality in admitting evi-

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104. *See id.*

105. *See* Langer, *supra* note 87, at 847 (stating that "[t]he unitary court [in civil law jurisdictions] renders detailed rules of evidence practically meaningless"); *accord* Rachel A. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 11 EMORY INT'L L. REV. 419, 427-28 (1997).

106. Mary C. Daly, *Legal Ethics: Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems*, 2 J. INST. STUD. LEG. ETH. 65, 71 (1999) (describing panels as "most likely consisting of three professional judges and several lay persons"); Bandes, *supra* note 57, at 418 (noting this phenomenon in France).

107. *See* Hazard, *supra* note 77, at 1021 ("The necessity for such further inquiry will be signaled by the party against whom the evidence was received. Evidence received on a tentative basis is taken as truth if there is no negative signal from the opposing party . . . . "); *see also* Dixon, *supra* note 30, at 92-93 ("In the civil law system, the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth." (citing Prosecutor v. Tadiæ, Case No. IT-94-1, Decision on Hearsay, ¶ 13 (Aug. 5, 1996))).

108. Mirjan Damaška, *Atomistic and Holistic Evaluation of Evidence: A Comparative View*, *in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 91, 94 (David S. Clark ed., 1990).

109. This is not to say that admissibility rules are completely non-existent, however. *See id.* at 95 n.9 ("Rules rejecting evidence on grounds extraneous to truth-finding (*e.g.*, excluding illegally obtained evidence) are found in many Continental countries. In most Continental systems, privileges of witnesses to refuse to testify are more generous than in common law jurisdictions.").

110. *See id.* at 95 ("[T]he common lawyer will search in vain for those admissibility rules that are predicated on the idea that some information, albeit probative, can so easily be overvalued or is otherwise so volatile that it should not be presented to the factfinder (for example, gruesome evidence, hearsay, and so on). Also exceedingly rare or absent are rules and practices requiring the factfinder to use some evidence only for certain surgically limited purposes [as is sometimes the case in common law systems]."); *see also* BANTEKAS & NASH, *supra* note 76, at 438 ("Since the finding of guilt is a task of the judges, with or without the assistance of lay members who are trained and experienced in assessing the weight of the evidence, evidence is more likely than not admitted at trial.").

111. Of these 125, only ten were rules of evidence. *See* ICTY Rules of Procedure and Evidence, Previous Versions, http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence (last visited May 30, 2011).

112. Moranchek, *supra* note 9, at 480 ("[B]y way of comparison, a committee of American judges and law professors spent four years drafting the first U.S. Federal Rules of Criminal Procedure in the early 1940s.").

dence.[113] It is not clear why the common and civil law features were combined in this way; there is no publicly available drafting history of the Rules of Procedure and Evidence.[114] It should not be surprising that some believe the unique combination to be more a political compromise than a well-considered allocation of powers and privileges.[115] The Rules' initial embrace of the adversarial approach can perhaps be attributed to the fact that the United States provided the most detailed set of proposals.[116] Whatever the reason, it has not stopped the Rules' slow shift through the years to the other side, such that the ICTY now exhibits more features characteristic of civil law systems.[117] The Rules' seemingly *sui generis*[118] existence—and their numerous amendments[119]—illustrate the competing tensions[120] among the rules that have driven the amendment process and the jurisprudence of the ICTY.[121]

As stated, the ICTY Rules began with a decidedly common law tilt.[122] The initial rules provided for an independent prosecutor,[123] the prosecutor had to prove guilt beyond a reasonable doubt, witnesses were subject to routine cross-examination, and there were few exceptions made to the requirement of live witness testimony.[124] In this sense, these party-driven trials[125] very much resembled common law trials. These features are largely still in place, except there is now a much greater emphasis on the submission of documentary evidence.[126]

Even at this very early stage, however, there were departures from the standard common law model for criminal trials. For instance, a majority of the three-judge bench could find guilt; the defendant had a right to give an unsworn and un-cross-examined statement at the beginning of trial, as well as testify as an ordinary witness; the prosecutor could

113. *See supra* Part III.A.

114. Dixon, *supra* note 30, at 95.

115. *Cf.* Robinson, *supra* note 90, at 1057 ("There is no fundamental principle of law requiring that tribunals like the ICTY work in both systems. The considerations that explain the ICTY model are political, not legal").

116. Moranchek, *supra* note 9, at 480; *see also* BANTEKAS & NASH, *supra* note 76, at 438 (noting that rules are "predominantly common law rooted" because "[r]epresentatives of common law systems, particularly the US, played a more influential role in the drafting process"); SCHUON, *supra* note 62, at 184 n.426 (noting "striking" similarities with U.S. law in certain provisions).

117. *See Rules of Evidence*, *supra* note 14, at 762; SCHUON, *supra* note 62, at 186 (noting the "remarkable shifts of an ICTY trial towards a civil law-style criminal trial"); *The ICTY Comes of Age*, *supra* note 26, at 104 (noting the shift).

118. Some use the word "hybrid" to describe the ICTY, though others object to the use of this term. *Cf.* Langer, *supra* note 87, at 835 (rejecting characterization of ICTY as "an undefined hybrid system").

119. *See* Moranchek, *supra* note 9, at 480-81 ("[T]he rules [have been] modified frequently over the years; in 2000 and 2001 alone, ninety-one rules were amended, seven new rules were adopted, and one was deleted.").

120. *See* Langer, *supra* note 87, at 853-68 (discussing the common law/civil law tension at the beginning of the ICTY's existence).

121. *See* Robinson, *supra* note 90, at 1056 ("The practice of drawing from both legal systems to produce a law for the Tribunal that is not just an amalgam of both, but one that is *sui generis*, is a continuous process, which, for the most part, takes place not consciously, but imperceptibly.").

122. *See Rules of Evidence*, *supra* note 14, at 762 ("The first version of the Rules, adopted back in the early nineties, tilted definitely toward the Anglo-Saxon model.").

123. ICTY Statute, *supra* note 40, at art. 16.

124. *Incredible Events by Credible Evidence*, *supra* note 23, at 537.

125. Robinson, *supra* note 90, at 1039.

126. *See infra* notes 137-49 and accompanying text.

appeal an acquittal; and the judges could question and call their own witnesses.[127] In addition, there was some amount of collaboration between the Trial Chamber and the prosecution in analyzing and authenticating particularly sensitive or problematic information, such as intelligence evidence.[128] Finally, the admission of depositions was allowed in "exceptional cases,"[129] corroborative affidavits were allowed regardless of the content of the declaration, and judicial notice of "adjudicated facts" was accepted.[130]

The tilt towards preferring live testimony but allowing exceptions for exceptional circumstances did not last forever. As the number of arrests increased and the length of the defendants' pre-trial detention extended, the slow pace and high cost of trials resulted in mounting pressure on the ICTY to expedite its proceedings.[131] This eventually led to the development of the Completion Strategy, which set time targets for both the ICTY and ICTR to finish their business.[132] With this pressure over their heads, judges needed ways to speed up trials. The practical experience of real trials had quickly brought gaps and deficiencies in the Rules to the surface,[133] and the most logical way to fix problems was through interpretation or amendment. Thus, while the Rules initially explicitly favored live testimony, judges became more flexible in interpreting the Rules to permit the introduction of substitutes for live witnesses.[134] One example of this more liberal conception

127. *Incredible Events by Credible Evidence*, *supra* note 23, at 537. One former ICTY judge has anecdotally noted problems that judges who are active questioners have caused counsel. *See The ICTY Comes of Age*, *supra* note 26, at 90 ("[C]ivil law judges may question witnesses much more freely than in our [*i.e.* the U.S.] system. However, I have noticed that such questioning may throw off the rhythm of the prosecution's or the defense's case presented in an adversarial mode, casting the judge in the role of an uninvited guest at the party. The prosecution or the defense may have a carefully selected series of witnesses, called in sequence to build on each other's testimony and with knowledge of just how far to take each witness in questioning. The other side, for its own strategic reasons, may have no desire to press that witness further, but then when the judge steps in and asks the ultimate blunt conclusionary questions the prosecution (or the defense) have been slowly and painstakingly working toward, the lawyer that presented the witness must scramble to get back control of the case. Additionally, judges don't always repeat the witness's testimony precisely when they ask a follow-up question (or, not infrequently, it may be garbled in translation), thereby risking an answer based on an erroneous premise.").

128. *See* Moranchek, *supra* note 9, at 494 ("Given the international checks and balances on tribunals like the ICTY, however—where no one national party controls the intelligence gathering efforts, the prosecution team, and the judicial process collectively—a measure of trust and collaboration seems more appropriate than it might in a national law context . . . As long as the prosecutor's office undertakes reasonable efforts to make its methodology transparent, such efforts do not pose a substantial problem for defendant's rights.").

129. *Incredible Events by Credible Evidence*, *supra* note 23, at 544 (noting that in the United States, deposition testimony is not allowed at all in federal criminal trials); *see also* FED. R. CIV. P. 32 (stating that deposition testimony can only be used in federal civil trials to impeach the testimony of a live witness or in exceptional circumstances).

130. *Incredible Events by Credible Evidence*, *supra* note 23, at 545.

131. *Cf. id.*

132. *See generally* Sarah Williams, *The Completion Strategy of the ICTY and the ICTR*, *in* INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 153 (Michael Bohlander ed., 2007).

133. *See Rules of Evidence*, *supra* note 14, at 762.

134. *Id.* at 545 (noting that this was done "where, in [the judges'] view, the substitution [did] not invade too intrusively into the core guarantees of cross-examination and provide[d] sufficient indicia of reliability"); *see also* Prosecutor v. Naletiliæ and Martinoviæ, Case No. IT-98-34-PT, Decision on Prosecutor's Motion to Take Depositions for Use at Trial (Rule 71) (Nov. 10, 2000) (emphasizing "the great interest the Tribunal has in adopting measures that will expedite the proceedings before it").

of the Rules has been the Trial Chamber's allowance in several cases of the admission of transcripts of witnesses who testified in earlier ICTY cases,[135] to the concern of some.[136]

After a series of amendments to the Rules, though, liberal interpretation tactics were no longer needed. In 1999, Rule 71—dealing with depositions—was amended by the deletion of the requirement that such evidence only be admitted in exceptional circumstances.[137] Thus, in *Prosecutor v. Naletiliæ and Martinoviæ*[138] the Trial Chamber—over defense objection that witnesses should appear live at The Hague so that the judges could ask questions and observe their demeanor—authorized the prosecution to take twenty-three depositions to use at trial, finding persuasive the fact that the witnesses were predominantly going to testify about conditions not directly related to the accused.[139] In addition, in 2000 the old Rule 90(A)[140]—espousing the principle of live testimony—was

135. *See, e.g.*, Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence (Feb. 16, 1999) ("[T]he witness was extensively cross-examined in the *Blaskic* trial, and there is a common interest between the Defence in the two cases. Nonetheless, the fact remains that, if the evidence is admitted upon a hearsay basis, this accused will be denied the opportunity of cross-examining the witness. However, this is the case with the admission of any hearsay evidence . . . [I]n any event, any residual disadvantage to the accused is outweighed by the disadvantage which would be occasioned to the Prosecution by the exclusion of the evidence in the circumstances of this case."); *see also* Prosecutor v. Naletiliæ and Martinoviæ, Case No. IT-98-34, Decision on Prosecution Motion for Admission of Transcripts and Exhibits Tendered During Testimony of Certain Blaskiæ and Kordiæ Witnesses (Nov. 27, 2000) ("While the Trial Chamber agrees that the guilt of an accused can never be pre-determined [sic] by reference to other proceedings before the Tribunal, there are nonetheless common issues in many of the cases. Pre-requisite elements of offences charged in the indictments . . . such as the existence of an international armed conflict . . . or the existence of a widespread or systematic attack . . . fall within this category. These pre-requisite elements determine the category of crimes within the jurisdiction of the Tribunal that the alleged actions of an accused person are to be placed, and not whether an individual accused has in fact committed the acts alleged. Therefore, admitting evidence of such pre-requisite elements from other proceedings also covering a similar location and time period, in no way infringes the rights of the accused.").

136. *See, e.g.*, *The ICTY Comes of Age*, *supra* note 26, at 112 ("I must admit that I find the use of prior witness statements as a substitute for live testimony troublesome. In my short time at the tribunal I have seen too many instances in which witnesses on the stand have changed, reneged, or even repudiated earlier statements which though closer in time to the events, had not been tested in any way and were unsworn. Often the statement the witness signs for a Prosecution investigator in the field is not even in his native language. It has been orally translated from English and read to him in Serbo-Bosnian-Croat.").

137. *See* ICTY Rules of Procedure and Evidence, Rule 71, U.N. Doc. IT/32/Rev.7 (Jan. 18, 1996) (now allowing depositions "[w]here it is in the interests of justice to do so"); *see also Incredible Events by Credible Evidence*, *supra* note 23, at 546 n.55 ("Perplexingly, the amendment to the deposition rule was adopted to allow for this device in matters not in serious dispute, as contrasted to the prior judicial requirement that it be used only for important evidence.").

138. Prosecutor v. Naletiliæ and Martinoviæ, Case No. IT-98-34, Decision on Prosecution Motion for Admission of Transcripts and Exhibits Tendered During Testimony of Certain Blaskiæ and Kordiæ Witnesses (Nov. 27, 2000).

139. *See* Prosecutor v. Naletiliæ and Martinoviæ, Case No. IT-98-34-PT, Decision on Prosecutor's Motion to Take Depositions for Use at Trial (Rule 71) (Nov. 10, 2000) ("[M]any of the witnesses were prisoners in camps mentioned in the indictment and their testimony covers matters such as general living conditions and the occurrence of forced labour in the camps . . . witnessing acts such as beatings, hearing gun shots and/or screams, and being the victim of, or witness to, property damage . . . [T]he Trial Chamber has been guided by the fact that the witnesses proposed for deposition will not present eyewitness evidence directly implicating the accused in the crimes charged, or alternatively, their evidence will be of a repetitive nature in the sense that many witnesses will give evidence of similar facts.").

140. "Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71." ICTY Rules of Evidence and Procedure (Revision 6), Rule 90(A), U.N. Doc. IT/32/Rev. 6 (Oct. 6 1995). Of course, at the time this Rule

deleted entirely and replaced with Rule 89(F): "[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."[141] Thus, the old preference for live testimony has been replaced with a provision that is essentially neutral as to whether testimony is oral or written.[142] Finally, also in 2000, Rule 92 *bis*[143] was added, providing for circumstances[144] when written statements and transcripts can be admitted into evidence, so long as they do not go to the conduct or acts of the accused.[145]

Other rules, in place at the very beginning, also speak to civil law influence in the Tribunal. As in most civil law systems, the perceived reliability of evidence will usually go to its weight, not its admissibility.[146] Thus, hearsay and opinion evidence is generally freely admissible.[147] Evidence of a consistent pattern of conduct is also admissible "in the interests of justice."[148] Rule 95 is the only exclusionary rule, keeping out any evidence "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[149] And there is generally no need for corroboration for witness testimony.[150] The standard of proof is on the balance of probabilities, meaning the party seeking to tender a document has to show some relevance, some probative value, and some reliability.[151]

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was in effect, the "exceptional circumstances" standard was still qualifying the depositions exception. *See id.* at Rule 71.

141. ICTY Rules of Procedure and Evidence, Rule 89(F), U.N. Doc. IT/32/Rev.7 (Jan. 18, 1996).

142. *See supra* text accompanying note 137.

143. Rules inserted between two other Rules are designated by Latin numeral adverbs to avoid renumbering all of the Rules. "Bis" means "twice" in Latin. Many Rules have been added since 1994; thus, after Rule 92 *bis* comes Rule 92 *ter* and Rule 92 *quater*.

144. *See* ICTY Rules of Procedure and Evidence, Rule 92 *bis*(A)(i), U.N. Doc. IT/32/Rev.7 (Jan. 18, 1996) (noting that factors in favor of admitting evidence include circumstances in which the evidence (a) is of cumulative nature, (b) relates to the relevant historical background, (c) consists of statistical analysis of the ethnic composition of the population, (d) concerns the impact of crimes upon victims, (e) relates to the character of the accused, and (f) relates to sentencing issues); *see id.* at Rule 92 *bis*(A)(ii) (noting that factors against admitting such evidence include circumstances in which (a) there is an overriding public interest in the evidence being presented orally, (b) a party demonstrates that the evidence's natures or source renders it unreliable or so prejudicial that its effect outweighs its probative value, and (c) other factors make cross-examination appropriate).

145. ICTY Rules Dec. 8, 2010, *supra* note 15, at Rule 92 *bis*.

146. *See Rules of Evidence*, *supra* note 14, at 769 (noting language in cases indicating "reliability is not a judgment that must be made at the admissibility stage, but only goes to the weight of the evidence.").

147. *Id.* at 768-69 ("There has never been a bar against hearsay in ICTY trials . . . Besides hearsay, lay witnesses pretty freely engage in opinion testimony.") This does not mean that the evidence is always admitted. *See id.* ("There were, however, originally a few Appeals Chamber decisions saying that reliability is a component of probativeness, and that written statements not under oath taken by a field investigator, who speaks a different language, from the witness whose answers are then translated into an English document which the witness signs, is not probative when it concerns a critical part of the case and is uncorroborated.").

148. ICTY Rules Dec. 8, 2010, *supra* note 15, at Rule 93; *see also* BANTEKAS & NASH, *supra* note 76, at 449 ("Whilst civil law systems generally the admission of evidence of previous misconduct of the alleged perpetrator, such is prohibited in common law jurisdictions.").

149. ICTY Rules Dec. 8, 2010, *supra* note 15, at Rule 95.

150. *See* Byrne, *supra* note 23, at 615 ("[T]he Rules of Procedure and Evidence of both ICTR and ICTY do not require corroboration").

151. BANTEKAS & NASH, *supra* note 76, at 458 ("The fact that the author is unknown, the signature illegible, and the seizure disputed are matter which will affect the weight to be given to the evidence so long as there is a minimum showing of *indicia* of reliability.").

In summary, the ICTY's more common law, adversarial approach has from the beginning been in tension with many of its civil law characteristics. Though a piece of evidence's reliability was rarely used to exclude its admissibility, the *kinds* of evidence that are now admissible have broadened considerably. Now that documentary evidence has a much stronger foothold in ICTY's jurisprudence, the evidentiary tilt has been reversed towards that of civil law systems.

IV. Theories of Evidence

Evidence law can be defined as a series of compromises created to accommodate a variety of competing tensions. Though the ascertainment of "truth" is generally seen to be the ultimate goal of evidence law, there are a number of other rationales in play. These might include such considerations as saving time and money, minimizing the danger of unfair prejudice, avoiding confusion of the trier of fact, affording fairness to witnesses or the defendant, and preserving the parties' right to test the trustworthiness of evidence.[152] Thus, efficiency and finality of decision may be deemed important in one context, while fairness to the defendant may win out in another.[153] Additionally, evidence may be excluded for social policy reasons despite being deemed highly relevant and reliable.[154] Given these other considerations, it is important to reflect on the value choices behind our current rules, how different values might be in play in different legal systems, and how we can design rules for a particular legal system that accommodate these different values in a way that is acceptable to the members of that system.

As a preliminary matter, it is useful to note some of the inherent difficulties in ascertaining truth. First, it is usually necessary to rely on incomplete sources of information.[155] Unlike a moot court competition, the facts are never clear. This factual uncertainty is magnified enormously in international crises such as those in Rwanda and the former Yugoslavia. Second, our individual understanding of the world around us is inherently subjective and often unreliable.[156] (This is a reality so obvious that it barely requires mention, but it nevertheless has a substantial effect on how testimony is given and heard.[157]

152. RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCI. & STATUTES 11 (2007); *see also* FED R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

153. *Cf.* ALEX STEIN, FOUND. OF EVIDENCE LAW 218 (Oxford Univ. Press 2005) ("The conflicting presence of fairness and efficiency principles in evidence law constitutes a problem for cases featuring no specific rules that determine the apportionment of the risk of error.").

154. *Cf.* Mapp v. Ohio, 367 U.S. 643, 660 (1961) (creating Fourth Amendment exclusionary rule, barring evidence obtained in unreasonable searches).

155. Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 229 (1966), *reprinted in* WILLIAM TWINING & ALEX STEIN, EVIDENCE AND PROOF 321, 327 (N.Y. Univ. Press 1992).

156. *Id.*

157. *Cf. id.* at 231 n.35 ("Some witnesses lie, and some (though blessed few) perhaps observe, remember and recount with a high degree of fidelity to what 'really happened,' but by far the greater number do neither. Witnesses (like plumbers, lawyers, psychiatrists and even judges) filter what they perceive through a complex maze of ego-preserving defense mechanisms . . . which have the effect of deluding themselves most of all into believing that they are telling the truth, the whole truth and a great deal of it." (quoting Richard C. Allen, *The Dynamics of Interpersonal Commc'n & the Law*, 3 WASHBURN L.J. 135, 137 (1964))).

Third, subjectivity will also afflict the judge, who comes to the table with many of her own societally constructed assumptions.[158] Again, the relevance of this factor is heightened in an environment as cross-cultural as that of the ad hoc international criminal tribunals. Finally, any factual findings will be based not on a description of the "real" world but upon a reality that has been constructed in court through presented evidence.[159] Given these circumstances, the judge's assumed role as an historian[160] is a precarious one, and it is the role of evidence law to negotiate these problems in the search for truth.

Exactly what role evidence law should play in this search for truth is much debated. Sir Rupert Cross, a great evidence scholar, famously stated, "I am working for the day when my subject is abolished."[161] This abolitionist view is one shared by many, perhaps most notably by the great utilitarian Jeremy Bentham (1748-1832).[162] Bentham's influential works[163] specifically advocated abolishing all binding technical rules of evidence.[164] He abhorred judge-made law,[165] trusting judges as fact-finders but not as competent creators of substantive legal rules that accommodate value preferences.[166] As a result, he advocated the codification of rules, grounded in the sole value of utilitarianism, to constrain judicial discretion.[167] This constraint was needed to prevent judges from injecting their own value preferences into decision-making; abolitionists like Bentham believed that the only *enforceable* value preferences should be those formed by social-consensus mechanisms (*i.e.* law),[168] and that allowing anything else would be tantamount to licensing judicial dictatorship.[169] In sum, he believed the appropriate evidentiary methodology should be a system of unregulated fact-finding.[170]

There are at least a couple of reasons that explain this abolitionist wave, which has extended beyond the rules of evidence to include calls for abolition of the adversarial system altogether. One reason is the general skepticism that moral truths exist, much less

158. *See* Weinstein, *supra* note 155, at 232 ("The effort to reconstruct the past accurately is . . . inhibited by the effect which societal expectations and assumptions have on the trier.").

159. *See id.* at 229 ("[F]actual findings are based . . . upon a modified or constructive world of the law.").

160. *Cf. id.* ("The court is required to assume the role of historian—without the historian's opportunity to reserve decision. It is saved embarrassment by its acknowledgement that it is finding only 'operative facts,' for the purpose of the litigation.") (internal citation omitted); *see also Incredible Events by Credible Evidence*, *supra* note 23, at 536-37 ("A trial at the ICTY is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident.").

161. STEIN, *supra* note 153, at 111.

162. *See id.* at 108 ("This abolitionist claim has permeated legal discourse for approximately two centuries."); *see also* David Crump, *The Case For Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 585 (2006).

163. *See, e.g.*, JEREMY BENTHAM & JOHN STUART MILL, RATIONALE OF JUDICIAL EVIDENCE (London Hunt & Clark 1827).

164. WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 200 (Cambridge Univ. Press 2006).

165. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM & WIGMORE 115 (Weidenfeld & Nicolson 1985).

166. STEIN, *supra* note 153, at 116.

167. *Id.*; *see also* TWINING, *supra* note 165, at 115 ("Bentham was an ardent codifier . . . . ").

168. *See* STEIN, *supra* note 153, at 112 (describing factors explaining abolitionist wave in evidence law).

169. *Id.*

170. *Id.* at 116.

a judge who can determine them.[171] Likely, the greater reason for explaining the desire by some to abolish rules of evidence is the development of the empirical scientific method and the subsequent great advances in science and technology, which have in turn engendered confidence in human cognitive abilities.[172] These developments have brought not only criticism of the rules of evidence themselves but also their mode of presentation at trial; some commentators have called either for the reform or abolition of the current adversarial system, seeing it as relic from a past of very different circumstances.[173]

There are of course more moderate approaches to evidence; indeed, they predominate. The codification of the U.S. Federal Rules of Evidence generally reflects the perception in the United States that there is value in having binding rules that embody "both the accumulated wisdom of centuries of practical experience and some fundamental notions of procedural fairness[.]"[174] John Henry Wigmore (1863-1943),[175] the "pragmatic conservative," exemplified this approach.[176] He was more concerned with "rules of extrinsic policy," the "side constraints" on the pursuit of truth that often took focus away from Bentham's concern with the "rectitude of decision."[177] To be fair to Bentham, however, even he admitted that pursuit of truth was but a means to an end—the enforcement of legal rights and duties—and that this end could be weighed against other, collateral ends, like "the avoidance of the pains of vexation, expense or delay" in adjudication.[178] Of course, to Bentham, whether those collateral ends prevail over the pursuit of truth would be judged by the principle of utility.[179]

Despite the differences between these two scholars' viewpoints, their ultimate goal is essentially the same. Almost all specialized writings on the common law of evidence since Gilbert[180] have been founded on similar traditions. This "remarkably homogenous intellectual tradition" can be called the "Rationalist Tradition of Evidence Scholarship," the central purpose of which is adjudication leading to the pursuit of truth, subject to various

171. *See id.* at 112 ("Some moral truths have . . . been accused . . . of contributing to totalitarianism, racism, and poverty. These heinous experiences have further fortified the mood of suspicion in the domain of morality.").

172. *Id.* at 111; *see also id.* at 111-12 ("This empiricist turn characterizes not only natural scientists, but also many social scientists, law reformers, politicians, and people at large . . . The empiricist turn has also had exclusionary implications. Distrustful of any deductive reasoning from postulated foundations, this turn shattered numerous efforts . . . at replacing fragmented and diversified morality by moral truths.").

173. *See, e.g.*, Alexander Greenfeld, *Abolish the Adversary System*, 1 CAL. L. REV. at 12 (Dec. 1981) ("The adversary system was born before the development of the scientific method and before the concept of objective truth. It is time that lawyers take themselves out of the Middle Ages of primitive intellectual and economic resources, out of the darkness that pitted hungry man against hungry man and away from the primal fear that taught that battle, cunning and evasion were the only ways to survive."); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1031 (1975) (advocating reform of adversarial system).

174. TWINING, *supra* note 165, at 200.

175. *Id.* at 189.

176. *Id.* at 117.

177. *See id.* at 89 ("[T]here is no doubt about the high value Bentham placed on rectitude of decision."). In this sense, our common law procedural and evidentiary arrangements differ from a pure adversarial model. *See id.* at 200.

178. TWINING, *supra* note 165, at 89.

179. *Id.*

180. Lord Chief Baron Gilbert's Law of Evidence, written in the 1720s, was the first specialized work on evidence. *Id.* at 1.

side constraints (Wigmore's "rules of extrinsic policy" and Bentham's preoccupation with "vexation, expense, and delay").[181] The difference may simply be that Bentham was less willing to compromise on the search for truth.[182] In reality, however, our current institutions have not completely accepted Bentham's categorical approach to evidence; our current rules and practices balance utilitarianism with notions like due process (a practical approach that Bentham might castigate as "interest-begotten prejudice").[183] While Bentham believed no binding evidentiary rule could be devised that maximized "rectitude of decision,"[184] our systems today recognize certain core concerns—such as the need for procedural fairness—that operate as more than simple "side constraints" to the pursuit-of-truth value.[185] Whether these concerns need to be codified is still open to debate. Certainly, formal rules offer stability and predictability; but they are also inflexible, unable to accommodate unforeseen but relevant factors or scientific advances.[186] Conversely, informal rules permit a more holistic, balancing approach, but they are unpredictable, subject to judicial biases, and more time-consuming to adjudicate.[187] It will be up to a particular legal system—in our case, the international criminal tribunals—to determine the best approach.

V. Evidentiary Issues in the ICTY

A. GENERALLY

Trials in the ICTY are long. The average trial is over 100 days, though some last well over 200; the number of witnesses is also often in the triple digits,[188] and each witness takes an average of one full day to question.[189] Though reducing the number of witnesses would greatly speed things up (as live witnesses take up the most trial time), the prosecutor will often insist that she needs certain evidence to prove her case.[190] This is understandable given the unique problems posed by the prosecution of international crimes, which often require the presentation of events leading up to the outbreak of hostilities and the proof of certain predicate conditions, such as "the existence of an international armed conflict" or a nexus between the conflict and the alleged illegal acts.[191] The need for speed, spurred on the by Completion Strategy, is thus in great tension with the prosecutor's perceived need to adduce a certain amount of proof. This tension has to some extent been addressed—though not resolved—in the shift towards the use of documentary evi-

181. TWINING, *supra* note 164, at 199.
182. TWINING, *supra* note 165, at 117 ("Bentham may represent an extreme on the spectrum of views about the aims of [evidence] law . . . . ").
183. *See id.* at 168 (discussing reasons for partial failure of Bentham's approach).
184. *Id.* at 88.
185. *See* TWINING, *supra* note 164, at 197-98 (describing core procedural concerns in English civil and criminal law).
186. CARLSON, *supra* note 152, at 23 (quoting Robert H. Aronson, *The Federal Rules of Evidence*, 54 WASH. L. REV. 31, 37-38 (1978)).
187. *Id.*
188. *See Incredible Events by Credible Evidence*, *supra* note 23, at 535 ("Some trials have featured over 200 witnesses, and seven of the ten trials completed [by 2001] had over 100 live witnesses.").
189. *Id.* at 536.
190. *Id.*
191. *Id.*

dence (which does not even have to be presented by a witness) over live evidence in the ad hoc tribunals.[192]

The emerging dominance of written testimony has been but one of many methods used to speed trials along, though it is perhaps the most significant.[193] The use of documentary evidence has given rise to a number of due process concerns. It is true that the pressure of the Completion Strategy has necessitated a quickened pace, and the rules do, after all, grant the right to a speedy trial.[194] But to the extent the tribunals are concerning themselves with the speed of the proceedings alone, instead of the rights of the accused, they walk a fine line that threatens the legitimacy of the project. This tension between speed and fairness is not easy to resolve. Given the complex military, political, and legal environment in which these conflicts arise,[195] the trials will likely never be truly expeditious or perfectly "fair" for the defendant. For instance, when a prosecutor raids a Serbian army headquarters, snatching every paper in sight with the intent of sorting it all out later, it will be essentially impossible to authenticate documents or signatures; thus, the barriers to admissibility are lowered and the onus is on the defendant to then discredit the documents.[196] Presenting evidence in this manner would be unacceptable in the United States and other domestic legal systems, but many would say the realities of international crimes require such flexibility.[197] If true, however, any decision to make such a tradeoff should be made "conscientiously and consciously."[198]

The problem, of course, is that such tradeoffs are not always conscientious or conscious. The nature of the common law tradition is such that rules develop over time (theoretically for the better), but changes in the rules of the ad hoc tribunals have tended to reflect quick fixes rather than a long-range vision of what the rules should accomplish in a wider variety of cases.[199] This myopia mirrors the larger problem in the tribunals' shift from reliance on oral evidence to documentary evidence. Though the use of documentary evidence saves travel costs, saves time spent in hearings, curtails oral testimony, and can be more carefully studied than oral testimony, it suffers—from a common law perspective, at least—from some serious shortcomings: the veracity of the declarant's statements cannot be assessed because the declarant's demeanor cannot be observed[200] and the declarant

192. BANTEKAS & NASH, *supra* note 76, at 460 n.81 (citing Prosecutor v. Blaškiæ, Case No. IT-95-14, Judgment, ¶ 35 (Mar. 3, 2000)).

193. Other methods include more active case management by judges and the addition of a large number of ad litem judges.

194. ICTY Statute, *supra* note 40, at art. 21 (noting accused shall "be tried without undue delay"). The rules are, however, silent as to ensuring compliance with this requirement. Falvey, *supra* note 41, at 503. Perhaps, then, it in unsurprising that many suspects have spent many years in pre-trial detention.

195. *See* Dixon, *supra* note 30, at 88.

196. *Rules of Evidence*, *supra* note 14, at 771.

197. *See id.* at 772 ("[I]t is a slippery slope, and I have the impression that human rights activists and even some academics who would flinch at any such standardless trials at home, tend to swallow when they occur in war crimes prosecutions.").

198. *Id.*

199. *Id.* at 762.

200. This article lists this as a potential shortcoming only because common law lawyers generally believe the ability to observe a witness is quite important. Given the significant cultural differences among the individuals involved in these trials, however, one might reasonably question the ability of judges to attain useful information from a witness's demeanor.

cannot be cross-examined.[201] That the ICTY has deviated from these principles for apparently little other reason that expediency may be cause for alarm. This is the case not necessarily because the right to cross-examination is something we should be concerned about (though we should), but because these changes are not based on conscientious decisions of how best to construct trial proceedings that both sufficiently enable the prosecution and are fair to the defendant.

When viewed this way it becomes clearer why the solution is not necessarily to ditch documentary evidence and go back to all-oral evidence. The problem is not that the ICTY moved from a focus from (ostensibly) reliable evidence—oral testimony—to (ostensibly) unreliable evidence—documentary testimony—but rather that the ICTY may have moved from one approach to another without a compelling reason for doing so (apart from meeting a deadline), and without addressing the reasons why the first approach did not work (other than increasing the speed of adjudication). Because these rules of evidence lead to a substantial deprivation of liberty for many of these defendants, and because these trials may be critical to national reconciliation for some groups, the legitimacy of these and future tribunals would be better served by a more deliberate, long-term view to evidence-rule amendments.

B. Specifically

As indicated, however, the answer cannot simply be to revert back to the exclusive use of oral testimony.[202] Even without considering the glacial pace and astronomical costs burdening the earlier trials that insisted on live testimony, it is not obvious that the former approaches were any more successful at producing reliable evidence or protecting the rights of the accused than the new ones. For example, the reliability of testimony from witnesses suffering from PTSD or other stress-related disorders may be limited;[203] indeed, these disorders are presupposed, as evidenced by the general avoidance of expert testimony on PTSD.[204] Due to these inevitable distortions,[205] inconsistencies in prior statements are frequent, yet the ICTY has taken a restrained approach in attributing significant probative weight to this fact.[206] Recognizing that circumstances such as lapses in

201. *See* Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 Int'l Law. 47, 50-51 (1994).

202. *See Incredible Events by Credible Evidence*, *supra* note 23, at 535.

203. *See* Prosecutor v. Stakiæ, Case No. IT-97-24, Trial Chamber Judgment, ¶ 15 (July 31, 2003) ("Apart from the fact that much time has passed since 1992, the Trial Chamber is aware of the limited value of witness testimony in general. Special caution is warranted in cases like this one that have both a highly political, ethnic and religious element and a complex historical background. The Judges are convinced that for the most part, most witnesses sought to tell the Chamber what they believed to be the truth. However, the personal involvement in tragedies like the one in the former Yugoslavia often consciously or unconsciously shapes a testimony.").

204. Byrne, *supra* note 23, at 636.

205. *Id.* at 616.

206. *Id.* at 632; *see also* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 140 (Sept. 2, 1998) ("Since testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected. Hence, testimony is rarely exact at to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalising frailties in human perceptions. Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat

time between statements, translation issues, and the victims' traumas may all contribute to distorted testimony, at least one Trial Chamber has adopted the counterintuitive solution of simply using courtroom testimony, the testimony farthest removed from the incident in question, as the point of departure.[207] And no corroboration is needed.[208]

Translation is another difficult issue for the tribunals. For instance, numerous words in Kinyarwanda (Rwanda's primary language) can be translated in English as "rape."[209] In addition, one particular verb can be translated as either seeing *or* hearing, which, when combined with the purported Rwandan cultural tendency not to answer questions on sensitive matters directly,[210] means that it is often difficult to determine whether someone was an eyewitness or had just heard about something. Beyond these practical difficulties, several studies have shown that these technical and cultural factors not only result in flawed credibility assessments[211] but that they can also substantially affect the accuracy of the record.[212]

The tribunals' open admissibility of hearsay and opinion, both written and oral, also bears significantly on the accuracy of the record. As with most evidence in the ICTY (contrary to the U.S. system), the reliability of a piece of evidence goes to its weight rather than its admissibility.[213] Inconsistencies and other blemishes are judged by apparent non-standards (to common law ears) such as "accordingly" or "in that light."[214] Given the "everything comes in" approach, how are judges to weigh the evidence? While civil law judges may feel confident in their abilities to give appropriate weight to whatever evidence comes in, this otherwise-justifiable perception might be attributed to features of their own systems that have not carried over into the international criminal tribunals. For instance, a dossier created by an investigative judge who has supervised and often cross-examined witnesses' statements does not exist in the ad hoc tribunals.[215] Without a dossier, docu-

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forgetfulness as being synonymous with giving false testimony."); *but see* Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Dissenting Opinion of Judge Arlette Ramaroson, (Dec. 1, 2003) (cautioning against placing too much probative weight on vague descriptions).

207. Byrne, *supra* note 23, at 632-33.

208. *Id.* at 615.

209. *Id.* at 634.

210. *Id.*

211. *See Rules of Evidence*, *supra* note 14, at 769 ("I have seen many witnesses on the stand change many facets of their testimony from prior statements made out of court. I certainly could not have identified what was true, and what was not, from the written word alone; it is, frankly, hard enough in the courtroom judging demeanor when the witness speaks a different language and the translator has literally the last word on what the witness says.").

212. Byrne, *supra* note 23, at 623 (citing studies in Deborah B. Anker, *Determining Asylum Claims in the United States*, 19 N.Y.U. REV. L. & SOC. CHANGE 433 (1992), and CÈcile Rousseau et al., *The Complexity of Determining Refugeehood*, 15 J. REFUGEE STUD. 43 (2002)). Important for this area has been the use of expert testimony on cultural and linguistic issues. *See id.* at 634.

213. *See Rules of Evidence*, *supra* note 14, at 768.

214. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 143 (Sept. 2, 1998) ("Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of [the assumption that some or all witnesses may suffer from extreme stress disorders] . . . . ").

215. *See Rules of Evidence*, *supra* note 14, at 770 ("Now I am certainly not enamored of our hearsay Rules with their intricate exceptions. But I am also concerned that current international law tribunals not devolve into [something like *Yamashita*] . . . I often felt the need for more precise guidance than the assurance I could give testimony whatever weight I wanted, be it first, second, or third-hand hearsay. The confidence that civil judges have in their own capabilities in this regard may be traceable to parts of their indigenous process that have not been carried over into the Tribunal's hybrid system.").

ments submitted by the parties are simply pieces of paper; and given the lack of rules to guide reliability assessments, determining the evidentiary value of these papers is completely up to the judges.[216] These judges will thus have to rely on basic instincts of what is and is not allowed, which in turn can lead to wildly divergent results, given the variation in origin and training of the judges.[217]

This article proposes solutions to some of these problems that are simple but that have received remarkably little discussion. The first suggestion is that these and future tribunals employ powerful and independent investigative judges.[218] The second proposed solution is to engage in a more substantial codification of rules of evidence and procedure in the tribunals. This article will discuss each in turn.

1. *Investigative Judges*

The use of investigative judges should not necessarily stymie efforts by the parties to develop their own cases, but the judges' singular focus on amassing reliable information could create a separate tier of evidence that could bypass the embarrassing and damaging problems posed by both oral and documentary evidence used in the tribunals to date. This more reliable evidence would not only lead to a more just result for the accused; it would enhance the legitimacy of the courts within the post-conflict states and the international community in general. It would also provide the foundation on which judges could truly begin to fairly weigh competing pieces of evidence, which due to vague and open-ended rules has not been obviously successful.[219]

The inclusion of such a role does not come without costs, however. In particular, concerns regarding the impartiality of an investigative judge and the reliability of the dossier produced need to be addressed. Given that such judges already exist in certain civil law systems, it is useful to begin by examining whether these issues are problematic in real-world contexts. This article will discuss the use of investigative judges in France; while the situation there is not completely rosy, it is a useful illustration of some of the hurdles to be overcome. This article concludes that there is no reason to believe that the problems evident in the French system would be replicated in an international tribunal.

In France, there are two types of investigation: a police investigation and a judicial investigation, the latter having greater coercive powers.[220] Either the prosecutor or the victim, who many join the case as a civil party,[221] can open a judicial investigation, part of a process called *instruction*.[222] It builds on the work of a police investigation and is designed to determine whether the case should be referred to trial.[223] In cases where a

216. *Id.*

217. *See id.* at 763.

218. For discussions that hint at this, *see generally* McClelland, *supra* note 94; *see also* SCHUON, *supra* note 62, at 266 (proposing the use of a dossier in the ICTY).

219. *See infra* Part V.B.2.

220. CATHERINE ELLIOTT ET AL., FRENCH LEGAL SYSTEM 206 (Pearson/Longman 2006).

221. Daly, *supra* note 106, at 72 ("This enables the individual to have access to the magistrate's files and to the investigation itself as it develops and ultimately to win an award of damages if the defendant is found guilty.").

222. ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM 234 (Butterworths 2d ed. 1998).

223. ELLIOTT ET AL., *supra* note 220, at 206; *see also* JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 134 (2d ed. 2008).

judicial investigation is conducted (usually only particularly grave and complex cases),[224] the investigation is formally conducted by the prosecutor or in serious cases an investigative judge (*juge d'instruction*),[225] who is appointed to a three-year renewable term but in practice may remain there for many years.[226] The investigative judge is independent of the office of the public prosecutor (*ministère public*) and cannot be the trial judge in the same case.[227] The investigative judges are tasked with discovering the truth rather than the guilt of the suspect.[228] In so doing, they may visit the scene of the crime, hear witnesses, search and seize property, interrogate the parties, and arrest a person charged.[229] At any stage of the proceedings, the prosecutor's office can demand to see the dossier or request that the investigate judge carry out acts it believes would be useful to discover the truth and maintain security.[230] Similarly, the suspect and a civil party (*i.e.* a victim) may ask the investigative judge to carry out an act to discover truth.[231] The judge may refuse these requests, but she must give reasons, and the refusal is subject to appeal.[232]

The investigative judge in France is not a passive umpire.[233] Although there is input from both the prosecution and defense, the judge will question the accused and witnesses and may order further investigation, including for example the production of an expert report.[234] Materials used to establish guilt are put into the dossier, which is used at both the trial and appellate stages.[235] Parties can appeal a decision of the investigative judge, though the prosecutor's power to do so is greater than that of the accused or a participating civil party.[236] A prosecutor can petition the president of the court to have an investigative judge replaced "in the interests of the good administration of justice," for example if the proceedings have grounded to a halt or if it appears that the judge is not impartial.[237]

So far, so good. One critical problem, however, is that it is difficult for an investigative judge to carry out an investigation herself.[238] In complex cases, additional investigative judges may be added, but because there are so few investigative judges,[239] judges in practice ultimately delegate their authority to the police,[240] with a judge's role being primarily to watch over the investigation carried out in her name to prevent the abuse of the broad coercive powers.[241] Thus, theoretical judicial control is modified in practice by a delega-

224. ELLIOTT ET AL., *supra* note 220, at 207.
225. BELL ET AL., *supra* note 223, at 129; Jacqueline Ross, Book Review, 55 AM. J. COMP. L. 370, 373 (2007) (reviewing JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE (2005)).
226. WEST ET AL., *supra* note 222, at 234.
227. *Id.* at 234; *see also* BELL ET AL., *supra* note 223, at 128.
228. ELLIOTT ET AL., *supra* note 220, at 208.
229. *Id.*
230. *Id.* at 209.
231. *Id.*
232. *Id.*
233. BELL ET AL., *supra* note 223, at 128.
234. *Id.*
235. *Id.*
236. WEST ET AL., *supra* note 222, at 235.
237. *Id.*
238. ELLIOTT ET AL., *supra* note 220, at 209.
239. BELL ET AL., *supra* note 223, at 130.
240. ELLIOTT ET AL., *supra* note 220, at 207, 209.
241. *Id.*

tion of authority, such that the police conduct most investigations.[242] This poses two interrelated problems. First, the fact that the police are answerable to the Ministry of the Interior or the Ministry of Justice may feed the suspicion that the judiciary is dependent on politicians and that the police communicate information about their investigation to improper entities.[243] In addition, because the police are the predominant investigators, it is their work—and not that of the investigative judge—that is put into the dossier and used as the basis for judicial decisions.[244]

The role of the prosecutor in France also has a substantial effect on investigative judges. A French prosecutor exercises a supervisory function over the police and plays a more neutral and wide-ranging role than that of the partisan prosecutor in systems such as that in the United States.[245] Like many European countries, France has a career judiciary but unlike Germany, the judiciary also includes the prosecutor.[246] This commonality is demonstrated physically by the prosecutor standing on a raised platform beside the judge, while the defense attorney stands on the floor with the accused.[247] The shared status and the resulting ties of collegiality and ideology that bind them as *magistrats* militates against a clear separation of the prosecutorial and investigative roles.[248] From one perspective, having prosecutors in the same professional grouping as judges might be seen as strengthening the independence and credibility of the investigative function.[249] Instead, the blended role has generally been criticized; the investigative judge's close relationship with the police and prosecutor is said to undermine the judge's neutrality, which is of particular concern because trial judges tend to defer to the findings of the investigative judges who are assumed to have effectively supervised the investigation[250] and are themselves reliant on the version of the events given by the police and prosecutor.[251] Further, because the system assumes that judges protect the rights of the accused, the defense attorney has little power to intercede when judges fail to perform their functions.[252] Professor Jacqueline Hodgson produced an impressive study in which she conducted eighteen months of direct observation over a period of six years in the offices of prosecutors, investigative judges, gendarmes, and the national police.[253] Although all of her findings are well beyond the scope of this article, her monograph highlights the less-than-arm's-length relationship

242. BELL ET AL., *supra* note 223, at 130.

243. ELLIOTT ET AL., *supra* note 220, at 209.

244. BELL ET AL., *supra* note 223, at 130.

245. HODGSON, *supra* note 225, at 75.

246. *Id.* at 69; *cf.* BELL ET AL., *supra* note 223, at 127. In Germany, there are separate career structures for judges and prosecutors. HODGSON, *supra* note 225, at 69 n.17.

247. HODGSON, *supra* note 225, at 69 n.23.

248. *Id.* As one investigative judge stated, referencing prosecutors: "We are the same, we come out of the same school, we know each other. That is the real problem . . . I am often shocked by the way in which people talk about certain cases before and after the court hearing. That is already an encroachment on the independence of each . . . I once heard a judge say, "but of course we must defend the police." . . . That is the real debate. It is all the product of the ideology of society, the profile of the state. Our problem is based on having multiple functions coming out of the same school . . . Even I question myself: Do I work as a judge, investigator or partner of the police or *Gendarmerie*? I do not know." *Id.* at 70.

249. *Id.* at 71.

250. *See* Bandes, *supra* note 57, at 425; *see also* HODGSON, *supra* note 225, at 71.

251. *See* Bandes, *supra* note 57, at 420–21.

252. *Id.* at 425; *see also id.* at 420–21.

253. Ross, *supra* note 225, at 370.

between the investigative judge and prosecutor and between the prosecutor and police, as well as the practical diminishment of defendants' rights despite the formal strengthening of defense safeguards.[254]

The issues surrounding the use of investigative judges in France are good illustrations of the concerns when importing such a role into the ad hoc tribunals. The predominant concerns are neutrality and independence, but if the role were crafted with care, the use of an investigative judge in these tribunals could overcome these concerns. An investigative judge at an international tribunal would neither rely on local police to conduct investigations nor rely on potentially partisan prosecutors to supervise them. Rather, a special corps of judicial investigators working directly for and answering only to the investigative judge would be marshaled to carry out the task.[255] Further, placing the appointment of the investigative judge in the hands of the trial judges would ensure the independence of the investigative judges from political forces. This removal from executive interference, when combined with the fact that the tribunals are time-limited, would also help ensure the investigative judges' neutrality. Because the position of investigative judge in the tribunals would not be a career position, and because in any event the entities having the most immediate influence over the careers of those acting as investigative judges would be neutral parties (the trial judges), an investigative judge would have no more incentive to be non-impartial than any other judge. While lawyers from common law systems might be uneasy about the investigative judges having a substantially more active judicial role,[256] this unease may stem from an inappropriate equating of a judge's passivity with impartiality.[257] As noted above, active judging is present in numerous civil law systems—including the European Court of Justice, where a special judicial officer (judge-*rapporteur*) is responsible for building the record[258]—and concerns surrounding the impartiality of judges can be addressed through carefully crafted structural mechanisms, as with the selection of judges in any system, to prevent the role from being politicized.

These are merely the outlines of the role an investigative judge would play in an international tribunal. While an examination of the role of such judges in France shows that there are certain legitimacy concerns that would need to be addressed were such a role instituted in an international criminal court, a careful crafting of the position should address most if not all of those issues. Further, an international tribunal has a distinct advantage in overcoming these obstacles because "it is not tightly bound to socio-cultural premises and notions, or century-old legal traditions, as domestic legal systems."[259] As a result, an international court can make an experience-based assessment of its particular needs and customize its procedures to serve those purposes, unfettered by a particular legal tradition.[260] By having a clear vision of how an investigative judge would operate to

254. *See id.* at 373–75.

255. This has been done in Italy for the investigation of Mafia-related offenses, ELLIOTT ET AL., *supra* note 220, at 210, although Italy has eliminated the role of investigative judge and moved to a more adversarial system of criminal procedure. *See* Del Duca, *supra* note 85, at 74, 82.

256. *See* Bandes, *supra* note 57, at 428 ("At the risk of oversimplifying, inquisitorial systems are based on a willingness to trust judges, and our system [*i.e.* the U.S. system] is premised on a mistrust of judges.").

257. SCHUON, *supra* note 62, at 194, 262.

258. Koch, *supra* note 98, at 152.

259. SCHUON, *supra* note 62, at 251.

260. *Id.*

fulfill the specific needs of the tribunal, any concerns of how such judges have operated in other systems are relatively easily addressed.[261]

2. *Greater Codification of Rules of Evidence*

The second solution this article proposes is to engage in a more substantial codification of rules of evidence and procedure in the tribunals. The rules have engendered great uncertainty; vagueness invites open-ended interpretation using basic instincts that will vary considerably from judge to judge. Moreover, the lack of corroboration requirements or admissibility standards means that even the most unreliable evidence may stand on the same evidentiary plane as standard, authenticated evidence. Indeed, under the current approach there is often no way of knowing whether an assertion is reliable. How, then, can a judge be expected to "weigh" anything "accordingly?" On this point, a quote from Patricia Wald—who served on the D.C. Circuit Court of Appeals and was the U.S. judge at the ICTY for a number of years—is instructive:

> I do have practical problems with this "let a thousand flowers bloom" approach toward evidence. It may be that a "holistic" approach, in theory, means at the end of the trial a judge assesses the weight of each piece by looking at its place in the overall picture. But the ICTY trials take months, or even years, and in my experience at the end it is often difficult to recall (even with notes and transcript) individual pieces of evidence. Candidly, when it comes time to write up the facts in the case (and a typical case has 500 or more factfindings), a legal assistant is usually assigned the first draft without detailed instructions from the judges as to their assessment of the reliability of each piece of evidence and how it relates to the others. Often, sad to say, the legal assistant may not have been at the trial at all, or at least not all of it, and drafts from cold copy. I also think letting everything in and postponing valuations until the end of trial prolongs the trial itself; since the opposing party must assume that the evidence will be given some weight, they will take all precautions to challenge it, if there is even a remote possibility it will be critical . . . I fear the situation is a bit too wide open and unpredictable for my taste . . . .[262]

Because of this reality, without pre-screening it is difficult to imagine how judges, when the time comes to draft a judgment, could do anything but accept each piece of evidence as reliable. This inevitability cuts strongly against the criticism of many individuals who have suggested that restrictive evidentiary rules divert the parties' attention away from truth-seeking because everyone is caught up in "technical procedural issues."[263] After all, if everything is generally accepted as true, how is the truth-seeking value being fulfilled at all? While judges might be able to filter out what would be excessively prejudicial information to a layperson, they cannot do the same for evidence that is unreliable because they would have no way of knowing its reliability absent some inquiry. Further, fights

261. *Cf.* Salvatore Zappalà, *The Iraqi Special Tribunal's Draft Rules of Procedure and Evidence*, 2 J. INT'L CRIM. JUST. 855, 861–62 (2004) ("The main structural problem is that the drafters did not have a clear understanding of what the role of the investigative judge should be.").

262. *Rules of Evidence*, *supra* note 14, at 771-72.

263. *See, e.g.*, VLADIMIR TOCHILOVSKY, JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS: PROCEDURE AND EVIDENCE 275–76 (2006); McClelland, *supra* note 94, at 26-27; SCHUON, *supra* note 62, at 192, 264.

over the admissibility of evidence are not absent in civil law systems (nor are they in the tribunals themselves)[264]—for example, in France the parties may challenge the contents of the dossier, which is a complex area of law that involves judicial decision-making with respect to specific items in the file[265]—and there is no reason to believe that a managerial judge armed with clear guidelines could not prevent such rules from unnecessarily protracting trials.

This is not to say that the rules should parrot the Federal Rules of Evidence used in the United States. Intricate hearsay exceptions may not be appropriate in post-conflict international adjudication, but giving judges general guidelines—for example, avoiding reliance on second-or third-hand hearsay—may be appropriate. Whatever guidelines are established, citing the truth-seeking value[266] as the reason for avoiding restrictive evidentiary rules is somewhat inconsistent with other practices that have been adopted during the evolution of the ad hoc tribunals to exclude evidence—for instance, the increasingly managerial judging (including a judge's ability to direct the prosecutor regarding the counts of the indictment on which to proceed) and the use of a pretrial conference to reduce the amount of evidence presented and the complexity of the case.[267] For this reason, concerns that more restrictive rules would unduly shackle judges and prolong the proceedings may be overstated.

VI. Conclusion

The international criminal tribunals have sometimes been plagued by their "hybrid" status. Adversarial systems do not mix well with liberal admissibility rules, and as a result the trials at the ICTY have been incredibly slow. Judges hailing from a variety of legal backgrounds and who are often unschooled in cross-examination[268] must pull together a huge amount of evidence—often of unknown reliability—adduced by lawyers who also hail from a variety of legal backgrounds and who are also often not schooled in cross-examination.

Though headway has been made in making the proceedings more efficient—such as training inexperienced counsel, allowing for the use of video link instead of live testimony (which should be greatly expanded), and adding a number of ad litem judges—it is not apparent that any of these changes have been made with any eye towards the accused. Judges hold great power over the accused, yet because they have only vague rules, and

264. *See* BANTEKAS & NASH, *supra* note 76, at 468-69 (noting a dispute in two ICTY cases over the prosecutor's attempt to submit into evidence a dossier relating a particular attack; the court looked at the materials independently, rather than as a whole, and determined that not all categories of the proposed evidence should be admitted).

265. BELL ET AL., *supra* note 223, at 128.

266. Beyond truth-seeking, establishing a historical record of the conflicts is also a goal of the tribunals, but many have suggested that the adversarial trial process and factual-findings by judges may not produce the best approximations of history, and "the 'adjudication' by the ICTY of who started, prolonged, or ended the war and why in the context of criminal proceedings without the states themselves having input is basically unfair, or at least does not contribute to future reconciliation." *The ICTY Comes of Age*, *supra* note 26, at 11617.

267. *See* SCHUON, *supra* note 62, at 174-76, 182, 189.

268. *See The ICTY Comes of Age*, *supra* note 26, at 105 ("I came away from the two lengthy trials in which I have participated thinking that the potential of cross-examination by defense counsel in the search for truth has not been realized.").

because there are few reliability requirements of practical effect, the evidence with which judges are armed to convict these accused is often of questionable reliability. The institutional confidence in judges' ability to weigh these competing pieces of often-unreliable evidence threatens the legitimacy of these courts and future courts who would use these rules as models for their own. While it may be appropriate to lower the standards on oral and documentary evidence by some degree to accommodate the realities of international conflicts, this should result from a conscious decision that takes into consideration more than mere speed, especially given the capacity of other countries to give these defendants a fair trial in their own national courts.

Even scholars as diverse as Bentham and Wigmore would agree that the pursuit of truth is the major goal of evidence. It is not obvious, however, that the ad hoc tribunals have managed to achieve "truth," and to blame it solely on the complex nature of the proceedings would be to miss the larger problems with the rules of evidence themselves. In attempting to address these problems, the rights of the accused should be more than "side-constraints" (to use Wigmore's terminology) in these proceedings. This article has proposed two relatively simple but widely ignored solutions that would address these and other concerns. By combining a powerful and independent investigative judge with a more substantial fleshing-out of the rules of evidence and procedure, these and future tribunals could both speed up the trial process and better protect the rights of the accused,[269] thereby occupying a more legitimate place in the field of international criminal justice.

269. *See* Zappalà, *supra* note 261, at 856 (noting that the draft provisions of the rules of evidence and procedure for the Iraqi Special Tribunal for Crimes against Humanity were strongly influenced by rules of the ad hoc tribunals and the Special Court for Sierra Leone); *cf. Incredible Events by Credible Evidence*, *supra* note 23, at 114 ("[S]ince some of our *modus operendi* are being adopted or adapted—for better or worse—in the procedures of the permanent ICC, the Tribunal's due diligence is required to evaluate how our practices work in practice.").